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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 11-14220-alg

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In the Matter of:

ALEXANDER GALLO HOLDINGS, LLC, et al.

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

November 8, 2011

2:45 PM

B E F O R E:

HON. ALLAN L. GROPPER

U.S. BANKRUPTCY JUDGE

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HEARING re Motion Filed by Debtors For an Order Authorizing and
Approving the Sale of Substantially All of the Debtors' Assets
Free and Clear of All Liens, Claims, Encumbrances, and Other
Interests, Approving Auction and Bidding Procedures in
Connection With the Sale of Substantially All of the Debtors'
Assets, Authorizing Entry Into a Stalking Horse Agreement and
Approving Stalking Horse Protections, Approving Procedures
Related to the Assumption and Assignment of Executory Contracts
and Unexpired Leases, Scheduling Auction and Sale Approval
Hearing, Approving the Form and Manner of Sale Notice, and
Granting Related Relief

HEARING re Second Motion Filed by Debtors for an Order
Authorizing the Debtors to Assume and Pay Amounts Owing on
Certain Preferred Provider Network Agreements

Transcribed by: Lisa Bar-Leib

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A P P E A R A N C E S :

DLA PIPER LLP (US)

Attorneys for the Debtors

1251 Avenue of the Americas

New York, New York 10020

BY: THOMAS R. CALIFANO, ESQ.

JEREMY R. JOHNSON, ESQ.

DANIEL G. EGAN, ESQ.

COOLEY LLP

Attorneys for the Official Committee of Unsecured

Creditors

1114 Avenue of the Americas

New York, NY 10036

BY: JEFFREY L. COHEN, ESQ.

CATHY HERSHCOPF, ESQ.

ALEX R. VELINSKY, ESQ.

1
2 U.S. DEPARTMENT OF JUSTICE

3 Office of the United States Trustee

4 33 Whitehall Street

5 21st Floor

6 New York, NY 10004
7

8 BY: NAZAR KHODOROVSKY, ESQ.
9

10
11 DECHERT LLP

12 Attorneys for Bayside Capital

13 1095 Avenue of the Americas

14 New York, NY 10036
15

16 BY: MICHAEL J. SAGE, ESQ.

17 MICHAEL H.M. BROWN, ESQ.
18
19
20
21
22
23
24
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FAEGRE & BENSON LLP

Attorneys for Wells Fargo Bank, N.A.

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402

BY: MICHAEL R. STEWART, ESQ.

COLIN F. DOUGHERTY, ESQ. (TELEPHONICALLY)

FULBRIGHT & JAWORSKI LLP

Attorneys for Miller Hieman

666 Fifth Avenue

New York, NY 10103

BY: DAVID L. BARRACK, ESQ.

HUNTON & WILLIAMS LLP

Attorneys for Winston Noteholders LLC

200 Park Avenue

New York, NY 10166

BY: PETER S. PARTEE, ESQ.

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LOWENSTEIN SANDLER PC

Attorneys for Alex Gallo and Andrew Sims

65 Livingston Avenue

Roseland, NJ 07068

BY: SHARON L. LEVINE, ESQ.

TOM LIVOLSI, ESQ.

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P R O C E E D I N G S

THE COURT: Please be seated. May I have appearances, please? Alexander Gallo Holdings, et al.

MR. CALIFANO: Good afternoon, Your Honor. Tom Califano, DLA Piper, on behalf of the debtors. With me is my partner, Jeremy Johnson, and my associate, Dan Egan. And also in the courtroom for the company is Alex Gallo, the CEO, Andrew Sims, the CFO, and Dom DiCicco, the general counsel, and representatives of Gordian Group and Carl Marks. Thank you.

MR. SAGE: Good afternoon, Your Honor. Michael Sage of Dechert on behalf of Bayside. My colleague, Michael Brown, is here as well and our client from Bayside Adam Schimel is in the courtroom as well.

MR. COHEN: Good afternoon, Your Honor. Jeffrey Cohen, Cooley LLP, on behalf of the committee with my partner, Cathy Hershcopf, and my associate, Alex Velinsky.

MR. KHODOROVSKY: May it please the Court, Your Honor, Nazar Khodorovsky for the U.S. trustee.

MR. PARTEE: May it please the Court, Your Honor. Peter Partee from Hunton & Williams LLP here on behalf of Winston Noteholders LLC, chairman of the creditors' committee and the largest unsubordinated unsecured creditor.

MR. STEWART: Michael Stewart of Faegre & Benson on behalf of Wells Fargo as administrative agent for the senior lenders. And also on the phone today, Your Honor, just

1 listening, not participating, are the two loan officers in
2 charge of this matter, Reggie Dawson and Trent Brendon and my
3 colleague, Colin Dougherty.

4 MS. LEVINE: Good afternoon, Your Honor. Sharon
5 Levine and Tom Livolsi, Lowenstein Sandler, for Alex Gallo and
6 Andrew Sims.

7 THE COURT: All right. Mr. Califano, where do we
8 start?

9 MR. CALIFANO: Well, Your Honor, we have two motions
10 on today. One is a second motion with respect to the
11 assumption of what we have called preferred provider network
12 contracts. That we have not received an objection to. And we
13 also have the sale hearing to which we've received an
14 objection.

15 We have narrowed the objection with respect to the
16 sale. And we have agreed to defer, and we have to work out the
17 timing on this, the determination with respect to the purchase
18 of claims against Mr. Gallo and Mr. Sims. And what we've
19 agreed is to defer them. Having read the committee's
20 objection, we agreed to defer them to a later date because we
21 understand the committee has said they do not have appropriate
22 information to make a determination at this point. So what we
23 would ask is the issue with respect to whether it is
24 appropriate for the buyer to purchase those claims be deferred
25 to a date in which the committee will have what they believe is

1 the appropriate time to review those claims. So basically,
2 we're asking for that part of the sale to be carved out so we
3 can accommodate their request for more time.

4 THE COURT: But do you want a completed sale
5 motion today with a purchase price and an order? You said it's
6 a final order in your proposed 363 order. Is that what you
7 want?

8 MR. CALIFANO: Yes, Your Honor.

9 THE COURT: All right. So the question is whether or
10 not Mr. Gallo and Mr. Sims get a release for no further
11 consideration.

12 MR. CALIFANO: And it's not truly a release. It's
13 whether the claims -- whether it's appropriate for Bayside,
14 under the circumstances of this sale, to purchase those claims
15 without additional consideration.

16 THE COURT: But you're not telling me that Bayside is
17 going to turn around and sue Mr. Gallo.

18 MR. CALIFANO: No, they will not.

19 THE COURT: Okay.

20 MR. CALIFANO: We understand that they will not.

21 THE COURT: And this is only company claims. We're
22 not talking about third party claims under any circumstances.

23 MR. CALIFANO: Solely company claims, Your Honor.

24 THE COURT: All right. Okay. So I will look forward
25 to hearing from the committee exactly what remains at issue

1 having read their objection.

2 MR. CALIFANO: Well, Your Honor --

3 THE COURT: But I don't know what you believe still to
4 be outstanding but maybe it's better for us to hear from them
5 directly as to what they believe to be at issue at the moment.

6 MR. CALIFANO: Yes, Your Honor. I would just -- what
7 I was going to ask is should we deal with the assumption motion
8 which is unopposed first?

9 THE COURT: Well, let me ask you about the assumption
10 motion. If we approve the sale, it would seem to me there's
11 absolutely no reason for this debtor to make the payments if
12 it's going to come out of this debtor's pocket.

13 MR. CALIFANO: Well, Your Honor --

14 THE COURT: Are you telling me these cure payments are
15 going to be made by the buyer as additional consideration
16 simply put on top of everything else?

17 MR. CALIFANO: Yes, Your Honor. I mean, what really
18 is --

19 THE COURT: Then why do I have to deal with it today?
20 Why don't they just do what they want if they buy the assets?

21 MR. CALIFANO: Well, we could, Your Honor. But the
22 question is, it's a timing issue. We have made payments.
23 Right now, we're scheduled to close on the 23rd.

24 THE COURT: If I approve the sale today, the --

25 MR. CALIFANO: The closing would be on the --

1 THE COURT: -- projected closing date is November
2 23rd?

3 MR. CALIFANO: Yes, Your Honor.

4 THE COURT: All right. So everybody can enjoy
5 Thanksgiving?

6 MR. CALIFANO: That's the hope. That is the hope.

7 THE COURT: Okay.

8 MR. CALIFANO: And it's a timing issue because this is
9 a small world of court reporters. And certain of them have
10 been paid. Others have been -- are waiting to get paid. So
11 it's purely a timing issue because whether or not the buyer
12 pays it directly or whether it's paid by the debtor, it'll come
13 out of either the DIP or the purchase price. So it really is
14 just a timing issue.

15 THE COURT: What is the DIP today?

16 MR. CALIFANO: The DIP today, Your Honor, is six
17 million. It's estimated as of the closing, it'll be eight
18 million.

19 THE COURT: Why does it go up to eight million?

20 MR. CALIFANO: Just because of the timing of certain
21 payments.

22 THE COURT: And that's a payment for which the buyer
23 is responsible?

24 MR. CALIFANO: Yes, Your Honor. Well, the DIP under
25 the -- the DIP is just rolled into the purchase price.

1 THE COURT: Where do I see that? Is that in the
2 purchase agreement? It's not in -- I was looking for it ---
3 you gave me a bunch of schedules today. It's not in the
4 schedules, is it? I -- maybe I should withdraw the question.
5 If that's what the intention is, I assume the parties have
6 taken care to have it in there.

7 MR. CALIFANO: Yes, Your Honor.

8 THE COURT: But -- see, I have the schedule of assumed
9 liabilities: accounts payable, 4.1 million; payroll and
10 payroll taxes accrued, 1.7; reporter fees, 3.6. Total, 1.1. I
11 don't see the DIP in there.

12 MR. CALIFANO: Well, Your Honor, it is, I am told, in
13 1.2(a) which is description of the purchase price.

14 THE COURT: Okay. All right. And this additional --

15 MR. CALIFANO: You see --

16 THE COURT: The additional 400,000 that gets paid to
17 the preferred provider network is presumably in the 3.6 million
18 of reporters?

19 MR. CALIFANO: It is in -- yes, Your Honor.

20 THE COURT: Or it's somewhere.

21 MR. CALIFANO: Yes.

22 THE COURT: Okay.

23 MR. CALIFANO: But the DIP -- it's in the DIP budget
24 and the DIP financing agreement as part of the --

25 THE COURT: So as I understand the structure, all the

1 priority and administrative creditors get paid in full, Wells
2 Fargo gets paid in full, the second lien is satisfied by the
3 credit bid.

4 MR. CALIFANO: Yes, Your Honor.

5 THE COURT: And everybody gets something other than
6 the stockholders and the unsecured creditors.

7 MR. CALIFANO: Well, some of the unsecureds, Your
8 Honor -- there's about 3.9 million in cures. There is
9 approximately 2.6 million in the preferred provider network.
10 So what --

11 THE COURT: The employees are protected.

12 MR. CALIFANO: The employees are protected, Your
13 Honor.

14 THE COURT: Okay.

15 MR. CALIFANO: Your Honor, and what it was designed
16 and where we're going --

17 THE COURT: And I said before, that's pretty
18 impressive.

19 MR. CALIFANO: And I think --

20 THE COURT: I'm not ignoring that but I'll hear
21 from -- obviously, I'll hear from the committee whose duty is
22 to the unsecured creditors.

23 MR. CALIFANO: Well, there are -- and I just wanted to
24 point out there are some unsecured creditors, probably -- 2.6
25 plus 3.9 is 6.5 million of unsecured creditors -- their cure

1 costs are being paid in full. So --

2 THE COURT: How many -- what is left of trade
3 creditors?

4 MR. CALIFANO: There is, Your Honor --

5 THE COURT: I'm now excluding the debt.

6 MR. CALIFANO: The trade creditors -- there's -- I can
7 go through what's on the page. There's 8.5 million in the
8 balance of trade creditors. There's 6.1 million that is owed
9 to Mr. Gallo both in deferred comp and loans that he made for
10 the company which he received no payment. There's 300,000 in
11 loans made by Mr. Sims for which he received no payment. And
12 there's a hundred million of the AKKR notes and thirty million
13 of the Winston not for which he received no payment.

14 (Pause)

15 THE COURT: Okay.

16 MR. CALIFANO: And, Your Honor, the way it was
17 designed and the way it was negotiated was that next dollars
18 through the sale process would go to general unsecured
19 creditors. We ran the agreed upon marketing process that the
20 committee had weighed in on. We gave them updates on how the
21 process went. Unfortunately, there were no bids, no other
22 bidders even attempted to qualify. And I think that's evidence
23 that we've received full value for the assets. There was -- no
24 one showed up. No one was calling us the week before. People
25 came in and did due diligence. We had management meetings with

1 a number of potential buyers. The committee was brought up to
2 speed on all of this. No one posted which is probably a
3 reflection that we've gotten full value at least.

4 THE COURT: Well, there's a lot of debt. How much is
5 the second lien debt today?

6 MR. CALIFANO: The second lien debt is 31.3 million,
7 Your Honor. The first secured is estimated at 47.8. And then,
8 as I said, between professional fees, assumed liabilities and
9 wind-down costs, there's an additional 16.4 million.

10 The total cash -- or total purchase price, Your Honor,
11 when you factor in these items, not counting breakup fee and
12 bid protection and the like, exceeds 103 million.

13 THE COURT: Shall I hear from the committee as to
14 exactly where we are or any other party wishes to be heard?

15 MR. COHEN: Good afternoon, Your Honor. Jeffrey
16 Cohen, Cooley, on behalf of the committee. I didn't see anyone
17 else get up so I assume it's my turn. My apologies for my
18 voice.

19 Your Honor, the committee does, in fact, despite
20 filing an objection, echo your sentiment that it sounds like a
21 pretty good deal having covered those various buckets of claims
22 that Your Honor identified. Your Honor is right. That's a
23 solid result paying off the various tranches of security,
24 indebtedness, the admins and the priorities. And all that's
25 left are the unsecureds and equity. What we want is to make

1 sure, Your Honor, through something other than statements made
2 by counsel to the businesspeople that there is no, in fact,
3 undisclosed deal to deliver equity to either existing equity or
4 a management, one day, three months, six months after Your
5 Honor enters an order approving the sale. It's one thing we've
6 heard from counsel to Bayside and counsel for the debtor for
7 them to say that despite there being a very detailed equity
8 arrangement and compensation structure laid out for management
9 in a plan support agreement that was aborted on the eve of
10 bankruptcy, it's one thing to hear from counsel that since that
11 agreement was abandoned that there have been no current
12 discussions on what the terms of their retention will be post-
13 sale. But the fact is, Bayside is a financial party not a
14 strategic. They are retaining the CEO, CFO and all of other
15 management. And the terms of their compensation have to be
16 discussed at some point. And the question is, Your Honor, does
17 going through a 363 sale rather than a plan alleviate the
18 parties from the obligation to disclose to Your Honor what the
19 details of those arrangements are. And if it at all mirrors
20 what the plan support agreement was, somewhere close to fifty
21 percent of the equity in Newco of certain warrants were
22 exercised could have landed back in the laps of management.
23 And we just want to hear from the mouths of the businesspeople
24 before Your Honor enters an order approving a sale that gives a
25 distribution to all but unsecureds and equity that that's not

1 going to happen, Your Honor.

2 THE COURT: Well, let me ask you this. Is there any
3 prohibition on the new owners coming to an arrangement
4 regarding employment with former management?

5 MR. COHEN: I don't believe so, Your Honor. The part
6 that's troubling from an intellectual standpoint is you do sit
7 back and you say, well, you know, we're not in a plan context.
8 You don't need to disclose to me who their new directors are
9 going to be. They don't need to sit up here and tell me
10 they're not violating the absolute priority rule by
11 distributing equity to former equity holders who may also be
12 management. But, frankly, Your Honor, setting the Code aside
13 for a moment and realizing that we're in a sale hearing other
14 than a plan hearing, to us, it shouldn't change. To us, it's
15 still, for lack of a better term, morally distasteful that by
16 changing your disposition strategy, within twelve to twenty-
17 four hours of the bankruptcy filing, you could alleviate
18 yourselves -- or alleviate yourselves the obligation to own up
19 to certain burdens of proof and to certain disclosures to the
20 Court. And they can get on the stand, Your Honor, and say
21 exactly that, that they've had no conversations, they don't
22 plan on having conversations, they're going to work pro bono.
23 Let them say it to Your Honor and the order can get entered.
24 But, frankly, Your Honor, having seen an employment agreement
25 that governs the relationship between the company and the CEO

1 to date, having seen the level of detail that was included in
2 the original agreement between the parties, the committee finds
3 it hard to believe that no discussions had been or ever will
4 happen with regard to the terms of their compensation. And
5 when you're looking at a pot of upwards of 150 million dollars
6 of unsecured creditors that look to receive nothing, I think
7 it's important to make sure that nothing is somehow being
8 circumvented around them.

9 THE COURT: Well, let's parse out your three time
10 periods. One, they could get up and say, to use your words,
11 that they haven't had any negotiation since the filing. I
12 understand your point that before the filing there were
13 apparently some negotiations. But let us say they say we
14 haven't reached the issue yet. We want to hire you. We want
15 you to stay around but the terms have not been reached. Is
16 that the right thing to do or is that the wrong thing to do in
17 the context of this 363 sale as far as you're concerned? In
18 other words, is it right for them to say, look, we've got a 363
19 sale? It's not appropriate for us to discuss compensation at
20 this point. It's an issue but it's premature. Is that the
21 right or the wrong thing for them to do?

22 MR. COHEN: In the committee's view, that's the wrong
23 thing for them to do.

24 THE COURT: Wrong thing?

25 MR. COHEN: Indeed, Your Honor.

1 THE COURT: Why is that?

2 MR. COHEN: 'Cause, Your Honor, there was a marketing
3 process run for this company. Prior to the petition date, that
4 marketing process opened only to financial parties. Companies
5 prohibited from approaching strategics.

6 THE COURT: Right. But then after the filing, I
7 gather, it was opened up and you haven't complained that the
8 marketing process was somehow slanted, tilted, unfairly managed
9 to favor financial buyers rather than strategic buyers, is that
10 right?

11 MR. COHEN: We have not made that argument.

12 THE COURT: You have not made that argument. So as
13 far as I understand your position, management, in that respect,
14 didn't do anything wrong or at least they didn't get in the way
15 of their investment bankers or their chief restructuring
16 officer.

17 MR. COHEN: That's correct.

18 THE COURT: Okay. So why is it wrong for them to say
19 it's unseemly for us to discuss compensation at this point?
20 You're running the company. We're a buyer. We're going to
21 postpone that.

22 MR. COHEN: It's a good question, Your Honor. And
23 let's, if we can, play out the hypothetical a little bit
24 further.

25 THE COURT: Okay.

1 MR. COHEN: Despite the fact that we know that there
2 were no bids at the bid deadline. The fact that the process
3 was opened up as of the petition date or, I think, ten days or
4 so later to strategic parties, had a strategic party submitted
5 a bid by the bid deadline, it would have actually been
6 important to know if the financial party, the stalking horse,
7 had reached compensation arrangements with management 'cause at
8 an auction of comparing a strategic versus a financial where
9 the strategic was not going to retain management and the
10 financial would, you would have a different assumption of
11 liabilities column to compare against each other. So I think
12 it would have been important had a bid come in from a strategic
13 to know what deal was in place with management and whether that
14 would have impacted the valuation announcements --

15 THE COURT: Well, we do know. There wasn't -- we do,
16 know unless you challenge the assertion, there was no deal. So
17 their position is we had no deal. We might make one but we had
18 no deal, therefore, any other buyer is in the same position as
19 we are. You make your deal after the fact if you want to.

20 Mr. Califano?

21 MR. CALIFANO: I'm sorry to interrupt but I just want
22 to remind Mr. Cohen that we agreed that prior to the auction if
23 a deal existed, we would notify all qualified bidders as to
24 what -- and the committee, of course, what that deal was. So
25 we understand -- he's right that somebody would want to know.

1 And we anticipated that and we agreed that if a deal existed
2 prior to the auction that we would disclose it.

3 THE COURT: But your position is that no deal was
4 reached and no deal is in existence as of today.

5 MR. CALIFANO: It's better than my position. It's the
6 actual truth, Your Honor. But I will tell you if Mr. Cohen is
7 right that they should have been negotiating, the fault is on
8 me because I thought it would be inappropriate for them to
9 negotiate while we had a marketing process going on. So the
10 person --

11 THE COURT: Well, you might have read my decision in
12 Granite Broadcasting --

13 MR. CALIFANO: Yeah.

14 THE COURT: -- where I have dealt -- are you familiar
15 with it, Mr. Cohen?

16 MR. COHEN: I am, Your Honor.

17 THE COURT: I have dealt with these issues.
18 Certainly, my view in that case was that you shouldn't. You
19 should divorce what management is going to get from
20 management -- if anything, from management's administration of
21 any sale or bidding process. At least, that was my view in a
22 very hotly contested case, In re Granite Broadcasting, 369 B.R.
23 120, for those who are interested.

24 MR. CALIFANO: And one more fact, Your Honor. We did
25 disclose in the schedules that the buyer did intend to offer

1 employment post-sale hearing to the four insiders. We did
2 disclose that and we actually asterisked it. And we informed
3 the committee of that early on. But no terms were reached and
4 no terms were actually negotiated during the marketing period.

5 MR. COHEN: Well, in the sale motion, the debtors
6 disclosed that the management and the buyer were in the process
7 of negotiating the terms of post-sale compensation. So while
8 they throughout said that no compensations were happening, in
9 the motion it said they were and that they will continue. So
10 there was a little bit of a mixed message in that regard, Your
11 Honor. There was slightly more than just the instinct or the
12 gut feeling that discussions have to happen at some point
13 anyway given the deal that was in place within hours of the
14 bankruptcy filing that was abandoned between the parties.

15 And, Your Honor, frankly, the committee is not
16 certainly discarding any of Your Honor's suggestions. We agree
17 with all your observations.

18 THE COURT: Well, you can -- you don't have to agree
19 with my observations or my decisions.

20 MR. COHEN: I know.

21 THE COURT: But I'm just trying to clarify where we
22 are.

23 MR. COHEN: And I haven't before. You've reminded me
24 of that.

25 THE COURT: You said when you broke, I think, your

1 time period into pre and post, you said they shouldn't have
2 any -- if I heard you right, you said they shouldn't have any
3 discussions post purchase. I don't -- is that the committee's
4 position?

5 MR. COHEN: No. No, Your Honor. And perhaps I may
6 have misspoken. If I did, I apologize. Your question was
7 breaking it into three periods. The last period we spoke about
8 was during the petition period, so petition date through today.
9 The post-sale period, actually, Your Honor, is what we're
10 concerned about. We have between today and the closing date.
11 We have the closing date thereafter. And your question was do
12 you think that we have a right or an ability to even control
13 what a buyer does with their company at that point. And I
14 think you're right. I agree with Your Honor the observation is
15 I don't think statutorily you necessarily have the ability to
16 tell a purchaser would a purchaser want to buy a company that
17 they still have oversight over. And the Court no one has
18 oversight after the purchase.

19 To us, to the committee, Your Honor, we do not believe
20 that parties should be rewarded, perhaps at the good advice of
21 counsel, for the timing of their discussions if the timing of
22 their discussions would change the outcome of today's hearing.
23 Just because you delay those discussions for a month, had you
24 had them a week ago, and they came in in front of Your Honor
25 and said twenty-five percent of the company was going to

1 management, would it be a problem, 'cause if it would be a
2 problem in that regard then it should be a problem anyway
3 regardless of timing. That's the committee's position. And if
4 the --

5 THE COURT: All right.

6 MR. COHEN: -- witnesses take the stand and they say
7 what they say which is what I expect to hear that there have
8 been and won't be, it is what it is, Your Honor. At least, the
9 businesspeople have gotten on and testified and Your Honor can
10 enter an order without us believing that maybe there's an
11 undisclosed agreement.

12 THE COURT: All right. Now the debtors want me to put
13 on for a subsequent hearing before November 23rd the question
14 of whether or not the company releases claims against Mr. Gallo
15 and Mr. Sims. I think that's the proposition.

16 MR. COHEN: Well, if it's the proposition between
17 counsel, it was not before November 23rd, then maybe I should
18 get updated.

19 MR. CALIFANO: Excuse me?

20 THE COURT: I thought that you wanted this done, if
21 possible, before the closing date.

22 MR. CALIFANO: If we could do it before the closing
23 date that would be ---

24 THE COURT: That would be good but not essential.

25 MR. CALIFANO: It would be -- I think it would be

1 appropriate. But if we can't do it before then, we'll do it
2 after.

3 THE COURT: All right. I'll hear from Mr. Cohen then
4 as to -- and I don't have to hear from him now as to what a
5 reasonable period of investigation would be.

6 MR. COHEN: No. I'm fine. If Your Honor's okay with
7 it, I'm fine -- I thought I had discussed with counsel that we
8 would try to do it in the next day -- he had said thirty days,
9 I had said sixty days. So November 23rd was not what we had
10 previously discussed. But --

11 THE COURT: Okay.

12 MR. COHEN: -- earlier in the case, Your Honor, we
13 advised the Court and the parties that the committee
14 intentionally did not retain a financial advisor earlier in the
15 case 'cause it wasn't necessary to mirror the efforts of the
16 debtors' financial advisor and investment banker for the sale
17 process but that we would ultimately want to retain someone for
18 the investigative phase of this case which would happen post-
19 sale. So it's at this time the committee's going to decide and
20 will likely retain somebody. And while we've gotten a
21 headstart on those efforts by collecting much of the raw data
22 that will be necessary, we do need to retain that individual or
23 that firm and do the proper analysis including the appropriate
24 solvency analyses at the times of the transfers.

25 So we believe -- if I'm being honest, Your Honor, I

1 think thirty to forty-five days is ample. But given that, we
2 have to retain somebody. And that we have Thanksgiving and the
3 holidays, we think sixty days makes sense.

4 THE COURT: Have you completed your examination of
5 the -- you had a specific period of time to examine into the
6 perfection of the first and second lien lenders. Have you
7 completed that?

8 MR. COHEN: We have, Your Honor. There'll be no
9 challenge.

10 THE COURT: There's no challenge. All right. That
11 simplifies matters.

12 MR. COHEN: This is -- and, in fact, Your Honor, there
13 were four insiders listed on the schedule. And the carve-out
14 only applies to two. So we've narrowed the issues greatly.
15 But the information we received on those two individuals we
16 have only received recently and we haven't had the assistance
17 of --

18 THE COURT: And the debtors propose to release a lot
19 of potential avoidance claims or at least to transfer them. I
20 gather they're being transferred to be released. Is that
21 correct, Mr. Sage?

22 MR. SAGE: Yes, Your Honor.

23 THE COURT: And I haven't heard any separate objection
24 to that.

25 MR. SAGE: That's correct, Your Honor.

1 THE COURT: Except that I would hope that since it
2 appears that the debtors are rejecting a lot of employment
3 agreements, setting aside the agreements of Mr. Gallo and Mr.
4 Sims, I would hope that if the debtors are going to release
5 claims against these same officers or employees that the
6 officers and employees, if they're going to get a release, will
7 release the company --

8 MR. CALIFANO: Yes, Your Honor.

9 THE COURT: -- as well from claims --

10 MR. CALIFANO: Yes, Your Honor.

11 THE COURT: -- under their employment agreement.

12 MR. CALIFANO: And one thing, Your Honor. There is a
13 significant number of avoidance actions that remain. And that
14 will be available for the committee, several million dollars of
15 avoidance actions.

16 I would just like to -- I don't know if Mr. Cohen is
17 finished or not but there's a couple of things he said I just
18 would like to address, Your Honor.

19 THE COURT: All right.

20 MR. CALIFANO: Mr. Cohen said something telling to me,
21 Your Honor. And I think we can dispose of this issue very
22 quickly. He said if it would change the outcome of today's
23 hearing. If a deal would change the outcome of today's
24 hearing. Now my understanding -- and if I'm wrong, Your Honor
25 -- my understanding is the only time it would be an issue in a

1 sale if there is a deal with insiders if a deal existed and we
2 didn't disclose it or if we favored one purchaser who provided
3 a deal to insiders as opposed to a purchaser who did not. Now
4 we know that didn't happen here because there was no other
5 purchaser.

6 Now, Your Honor, it was my belief, as Your Honor set
7 forth in the Granite case, that while we have this marketing
8 period, there shouldn't be active discussions between
9 management. I can't compel that but that -- you know, I can't
10 tell people not to talk but --

11 THE COURT: Sure you can.

12 MR. CALIFANO: Well, I can't make them not talk. But
13 I can advise them not to talk.

14 THE COURT: Well, hopefully, they're following your
15 legal advice.

16 MR. CALIFANO: But I didn't think it was appropriate,
17 Your Honor. I didn't think it was appropriate. And I thought
18 that management and the buyer did the right thing by saying we
19 intend to have employment agreements, we intend to offer
20 employment but there's no deal.

21 Now it goes both ways. The buyer doesn't know that
22 they're going to have this management team. The management
23 team doesn't know that they're going to have a job. There's an
24 understanding; nobody knows what the terms are. And they're
25 not compelled to make an offer for employment.

1 So, Your Honor, none exists. And we can have the
2 testimony from both Bayside and from Mr. Gallo that no deal
3 exists. Your Honor, we agreed that any deal that existed at
4 the auction would be disclosed to the committee and all
5 qualified bidders. But I think what Mr. Cohen said is the most
6 important thing. And the fact is if it would change the
7 outcome of today's hearing. And we've cited cases that say
8 there's no pro se prohibition. Everyone knows in these sales
9 when a financial buyer comes in, they usually keep management
10 on because a financial buyer doesn't have the management in
11 place.

12 THE COURT: Well, they may or may not. But --

13 MR. CALIFANO: They may or may not. But if there
14 was -- I submit, Your Honor, if a deal was struck between now
15 and the closing, after the closing, it's irrelevant, Your
16 Honor. What is happening here is no one is hiding the ball.
17 We're being completely open. There is no deal today.

18 Now the committee could have avoided this because they
19 could have deposed Bayside's representative. They could have
20 deposed the debtors' representative. We have depositions
21 scheduled --

22 THE COURT: Are you regretting a lack of depositions?

23 MR. CALIFANO: No. We scheduled them. They canceled
24 them, Your Honor. We had an interesting deposition of the
25 committee which we can talk about, Your Honor. It was a very

1 interesting deposition at which the chair of the committee who
2 was on the witness list but is the proverbial empty chair
3 today. But he said the committee has no evidence of a deal.

4 THE COURT: Well --

5 MR. CALIFANO: So we've had this --

6 THE COURT: -- I haven't heard the committee assert
7 that there is a deal. Committee has asserted that there were
8 discussions before the filing date.

9 MR. CALIFANO: Which we disclosed.

10 THE COURT: And I will, I think -- perhaps we are
11 getting to the question of what testimony you think we should
12 have for the record and what testimony the committee believes
13 we should have, what issues are -- what factual issues --

14 MR. CALIFANO: I agree, Your Honor.

15 THE COURT: -- are in dispute.

16 MR. CALIFANO: And Mr. Gallo is prepared to get on the
17 stand and say there's no deal. I understand from Mr. Sage his
18 client is prepared to get on the stand and say there's no deal.
19 But I think what's really important here, Your Honor, is that
20 it doesn't matter because even if a deal existed, as long as it
21 was not a hidden deal, as long as it's not an undisclosed deal,
22 it wouldn't give rise to an objection to the sale.

23 THE COURT: Perhaps you've answered your own question
24 in that -- or made your own point. If there was a deal, it was
25 hidden because it's been asserted by everyone that there wasn't

1 a deal. But I'll accept that as a proffer unless parties want
2 it confirmed under oath, which is perfectly fine. And maybe we
3 should have it confirmed --

4 MR. CALIFANO: Your Honor, I'd like to have it
5 confirmed.

6 THE COURT: -- under oath. All right, and that's not
7 the on -- that may not be the only issue. Maybe you want to
8 put on some testimony with regard to the sale process, although
9 I'm not sure there are any issues.

10 MR. CALIFANO: There are no issues --

11 THE COURT: Certainly no one has raised an issue that
12 the process wasn't open, wasn't professionally administered,
13 parties other than the buyer, the so-called stalking horse
14 buyer weren't given a fair opportunity and enough time to
15 examine the company and make a determination as to whether or
16 not they would submit a competing bid.

17 MR. CALIFANO: Well, Your Honor, it's not at issue,
18 but we could proffer the testimony of Mr. Kaufman who is here
19 from the Gordian Group, and he would testify that the debtors
20 and their professionals followed the marketing process as laid
21 out in Your Honor's bid procedures, that also the committee was
22 given regular updates on who was in the data room and who was
23 doing due diligence.

24 Additionally, Mr. Kaufman would testify that parties
25 that were brought to his attention by the committee were given

1 access to the data room and given an opportunity to determine
2 whether they wanted to make a bid.

3 He would also testify, Your Honor, that no bids were
4 received, qualified or unqualified, and that when contacted,
5 all of the parties who had conducted due diligence stated that
6 they declined to go forward.

7 So I don't believe we need testimony because it's not
8 at issue, but we can proffer the testimony of Mr. --

9 THE COURT: Well, let me ask the committee or any
10 party, does anyone object to receiving the proffer, and does
11 anyone wish to cross-examine Mr. Kaufman?

12 MR. COHEN: Your Honor, the committee indicated to Mr.
13 Califano yesterday we would stipulate to that testimony.

14 THE COURT: All right. Thank you. All right. I
15 think we already have testimony in the record with regard to
16 the bidding procedures hearing on the need for a quick sale and
17 on the debtors' business judgment in going forward with the
18 sale rather than with the plan, and I'll incorporate that
19 testimony in the record today, if there's no objection.

20 MR. CALIFANO: And I would believe then, Your Honor,
21 the only testimony that would be appropriate is Mr. Gallo's
22 testimony and Mr. Schimel's testimony that no deal exists and
23 also the basis for the good faith finding.

24 THE COURT: Yes. All right. Shall we do that? Let's
25 have Mr. Gallo come forward. Please state your name for the

1 record.

2 (Witness sworn)

3 THE COURT: Please be seated. Proceed.

4 DIRECT EXAMINATION

5 BY MR. CALIFANO:

6 Q. Mr. Gallo, what is your relationship to these debtors?

7 A. I'm the CEO of the company.

8 Q. You need to speak a little more clearly so the recorder
9 can pick it up.

10 A. Sure. The CEO of the company.

11 Q. That's something you should be --

12 A. Yeah. I should be. Yes. I'm sorry.

13 Q. Let me ask you directly, have you negotiated a deal with
14 the purchasing entity for any interest in the entity post
15 closing?

16 A. I have not.

17 Q. Okay. Was there a pre-petition term sheet for
18 participation in the post-reorganized debtor?

19 A. As a plan of reorganization there was, yes.

20 Q. Okay. And what happened to that deal?

21 A. The terms of that deal went away when we went to a 363
22 sale.

23 Q. And how was that communicated to you?

24 A. Through Peter Kaufman with Gordian.

25 Q. And what were you told by Mr. Kaufman?

1 A. That the original deal is off the table, the economics
2 have changed.

3 Q. Okay. And since that time has anybody indicated to you
4 that the original deal is back on the table?

5 A. Absolutely not.

6 Q. Okay. And what is your expectation post closing?

7 A. I expect to be working with the company for HIG.

8 Q. Okay. Do you have -- have you been told the terms of that
9 appointment?

10 A. No.

11 Q. Okay.

12 MR. CALIFANO: Thank you, Your Honor. No further
13 questions.

14 THE COURT: Anyone else? Any cross-examination?

15 MR. SAGE: No, Your Honor.

16 THE COURT: All right. Thank you, Mr. Gallo. You may
17 step down.

18 MR. CALIFANO: Mr. Schimel.

19 THE COURT: Please state your name for the record.

20 MR. SCHIMEL: Adam Schimel.

21 (Witness sworn)

22 THE COURT: Please be seated.

23 DIRECT EXAMINATION

24 BY MR. SAGE:

25 Q. Mr. Schimel, where do you work?

1 A. Bayside Capital.

2 Q. What's your -- what are your responsibilities regarding
3 Gallo investment banking?

4 A. I manage the investment on a day-to-day basis. I work on
5 a team of four people, I report to Jackson Craig who's the
6 senior partner on the transaction.

7 Q. And why isn't Jackson Craig here today?

8 A. His wife is in surgery.

9 Q. Other than the DIP loan and the second lien loan, does
10 Bayside have any interest in the Gallo Companies?

11 A. No.

12 Q. Was any employment arrangement negotiated with Mr. Simms
13 or Mr. Gallo since the petition date?

14 A. No.

15 Q. Was any equity, promise or arrangement negotiated between
16 Gallo -- between Bayside on the one hand and Mr. Simms and Mr.
17 Gallo on the other hand, since the petition date?

18 A. No.

19 Q. Is it possible -- do you believe, based on your course of
20 conduct at Bayside, that anyone other than you could have
21 negotiated such an arrangement for equity or employment?

22 A. No.

23 Q. And if someone had negotiated something from Bayside,
24 would they have talked to you about it?

25 A. Yes.

1 Q. In short, is there any kind of secret deal between Bayside
2 and Gallo?

3 A. No.

4 Q. Were the negotiations with respect to the APA, schedules
5 and the bid procedures before that hard-fought negotiations?

6 A. Yes.

7 MR. SAGE: No further questions.

8 THE COURT: Anyone else? Any other questions with
9 regard to the finding of good faith under 363(m)?

10 FURTHER DIRECT EXAMINATION

11 BY MR. SAGE:

12 Q. Did -- did Bayside have any discussions, whatsoever, with
13 any other potential buyers of the company during the bidding
14 period?

15 A. No.

16 Q. Or before?

17 A. No.

18 MR. SAGE: Thank you.

19 THE COURT: I take it, Mr. Schimel, that the
20 negotiations for the purchase were on an arm's-length basis and
21 there are no side deals that have not been disclosed?

22 THE WITNESS: That's correct.

23 THE COURT: Okay. Anyone else? All right. You may
24 step down. Thank you. Any other testimony?

25 MR. CALIFANO: No, Your Honor. Your Honor, I would

1 just state that the debtors believe that the marketing process
2 that was agreed to by the committee that they've attained fair
3 value of the assets. The sale, as currently constituted with
4 the components as described to the Court, is the best possible
5 result for these estates.

6 There is no allegation or evidence of any improper
7 conduct. Your Honor, the bidder, we believe -- the buyer, the
8 proposed buyer, satisfies the requirements of 363(n) and we
9 would ask that Your Honor authorize the sale and authorize the
10 debtor to expeditiously move towards closing.

11 THE COURT: Okay. Anyone else? Any further argument?

12 MR. COHEN: No further argument, Your Honor. Just the
13 only open issue, subject to Your Honor's comments, is the
14 timing on the carved out portion.

15 THE COURT: Let me make sure, Mr. Califano, that I
16 understand some of the terms, I haven't been in the middle of
17 this. I gather that you have until tomorrow to decide which
18 employment contracts to assume, is that correct?

19 MR. CALIFANO: Well, the debtor has -- I'm sorry, the
20 debtor has granted to the buyer certain designation rights so
21 contracts can move from the assumption to the designated, sort
22 of, holding pattern agreement. Then a period of time, post
23 closing to determine which agreements they will assume and
24 which they will reject.

25 THE COURT: How does that work?

1 MR. CALIFANO: Well Your Honor, as we stated at the
2 bid procedures hearing, we have agreed that certain executory
3 contracts, for a period post closing, so long as the buyer
4 agrees to pick up the administrative expense liability with
5 respect to those contracts, the decision to assume or rejected
6 will be abated for that period of time.

7 THE COURT: For how long?

8 MR. CALIFANO: It's, I believe, Your Honor -- it's
9 until confirmation of a plan, Your Honor. And we, just so that
10 Your Honor -- just to close the loop, we anticipate filing the
11 plan by the end of this week. We'll have drafts out to the
12 committee and to the purchaser hopefully within the next
13 twenty-four hours.

14 THE COURT: I'm not sure the purchaser has a very
15 great interest but I'm sure their comments would be -- would be
16 welcome. All right. I've already commented that it would seem
17 to me, if you're going to be releasing avoidance actions
18 against parties, before you do that you should be pretty sure
19 that those parties aren't going to be filing claims against the
20 company.

21 MR. CALIFANO: Yes, Your Honor.

22 THE COURT: That would include employment arrangements
23 as well.

24 MR. CALIFANO: Yes, Your Honor.

25 THE COURT: And I gather that although there were

1 four -- there's only one -- in the new schedules it's only the
2 Gallo avoidance action that is excluded, but I gather that
3 would be true for Mr. Simms if there is one as well.

4 MR. CALIFANO: Yes, Your Honor.

5 THE COURT: But only Mr. Simms?

6 MR. CALIFANO: Yes.

7 THE COURT: All right. Now cure amounts, I gather we
8 have procedures for determining cure amounts, if necessary, at
9 a hearing on the 16th at 2:30, is that right?

10 MR. CALIFANO: Yes, Your Honor.

11 THE COURT: Who pays for the cure amounts?

12 MR. CALIFANO: The buyer.

13 THE COURT: The buyer. All right. And it's hard for
14 me to tell, with all the changes made with regard to employment
15 benefit plans, are they -- are they going to create a series of
16 damage claims against the debtor or are they, in effect, either
17 going to expire or are they going to be assumed?

18 THE COURT: They will not -- they will not create
19 claims.

20 (Pause)

21 THE COURT: All right. I assume that what you've told
22 me with regard to employment contracts is basically what's
23 meant by 1.1(d)(xii) of the asset purchase agreement on page 8.

24 MR. CALIFANO: I'm sorry, Your Honor. I'm looking
25 at -- I must be looking a different version.

1 THE COURT: Looking at the blackline, which may be
2 different, this is the section called "Excluded Liabilities"
3 (d) (xii).

4 MR. CALIFANO: Yes, Your Honor. I'm sorry. What was
5 the question?

6 THE COURT: Well, I guess I could just ask you a
7 simple question, what does that mean? What does this paragraph
8 mean? You may want to consult with some of your colleagues.

9 MR. CALIFANO: Right.

10 MR. JOHNSON: Your Honor, if I may. Jeremy Johnson.
11 If -- this is a little bit confusing here because we refer to
12 employment contracts in two different senses. There are
13 employment contracts with -- most of them are being rejected
14 that are actual employment agreements with the other people.

15 THE COURT: Right. I see there's a list and it
16 includes --

17 MR. JOHNSON: And then -- but every employee signs
18 another type of employment contract, which is being assumed,
19 which is the confidentiality -- employment and confidentiality
20 agreement, that's not an executory agreement, that's not a
21 traditional employment contract. It just says you're employed
22 by us and you have to keep everything confidential. So that --
23 those contracts are being not assumed so much as acquired as
24 part of the process.

25 THE COURT: They're being reinstated.

1 MR. JOHNSON: They're being reinstated, exactly.

2 THE COURT: If the employee is reinstated.

3 MR. JOHNSON: Exactly. So it's a little confusing
4 when you speak of employment contracts. They're not
5 traditional employment contracts that are going to give rise to
6 claims at some point.

7 There are some that are being rejected, including
8 those for the insiders and a number of other people, but those
9 are being rejected.

10 THE COURT: Now while we're on it, what does 4.9 mean?
11 That's new. KEIP contracts, on or prior to November 9th,
12 that's tomorrow, the seller shall deliver the buyer a list
13 setting forth each current customer contract.

14 MR. JOHNSON: That's correct. Your Honor --

15 THE COURT: Which the debtor -- the seller believes
16 will generate revenue. That I understand.

17 MR. JOHNSON: Right.

18 THE COURT: And each written employment agreement,
19 each a key contract. And then the buyer has a period of time
20 to decide whether to assume or reject and that's what Mr.
21 Califano is referring to as the time between tomorrow and
22 confirmation.

23 MR. CALIFANO: Well, with these -- with these
24 particular contracts, Your Honor, they -- this is within three
25 days prior to closing. So -- no, I'm sorry; they can assume or

1 reject up to the plan confirmation, we just have to finalize
2 the list three days prior.

3 MR. JOHNSON: That's correct. That's just a -- that
4 section, Your Honor, is just a statement saying that we've
5 given them all the contracts that we need. When we refer to
6 those, sort of, customer contracts it's -- again, it's not an
7 executory contract it's an arrangement we have, the debtors
8 have, with a customer whereby they agree on certain pricing
9 terms. But it doesn't -- there are no obligations to provide.
10 In other words, the customer is not obligated to use Gallo,
11 it's just a negotiation therefore they're designated as revenue
12 producing and they're being acquired.

13 THE COURT: Okay.

14 (Pause)

15 THE COURT: All right. Anything -- those were my
16 questions, as best I could piece them together. Anything
17 further from any party? All right. And the question is
18 whether to approve the sale, the extent objection is a very
19 narrow one if there is an extent objection on the part of the
20 committee. It would seem to me that to the extent the
21 committee continues to object to the possibility of future
22 negotiations between the two top insiders of the debtor and the
23 purchaser, the objection should be overruled in that there's no
24 prohibition against the retention by a buyer, at 363 sale or
25 otherwise, in retaining some or all of the employees of the

1 prior entity, including the top management.

2 Obviously there are possible appearances that parties
3 need to be sensitive to. In a plan of reorganization, under
4 Section 1129, there's no prohibition or limitation on payments
5 made in connection with the case, but a requirement of
6 disclosure. If there are no such payments promised or agreed
7 to, then it would seem to me, even under 1129 there is no
8 issue.

9 Under 363, it would seem to me, that the issues can be
10 treated similarly but that the debtors acted appropriately in
11 postponing until after the completion of the sale process, any
12 discussions with top management and I'll cite my own decision
13 In re Granite Broadcasting Corp., again 369 B.R. 120.

14 The matter is a matter of sensitivity and I have no
15 complaint at all that the committee has raised it and the
16 committee is doing its job in investigating possible claims and
17 possible assets that this debtor may have in terms of
18 recovering amounts from insiders. But, it does not appear that
19 the sale process was at all adversely affected by any of these
20 matters.

21 I recognize the disappointment of the committee in the
22 current situation, which involves payment of everybody above
23 the unsecured creditors, but no definite recovery, at this
24 point, for the unsecured creditors. However, there is no
25 evidence that the difference would have been any different had

1 the same terms been incorporated in a plan of reorganization.
2 And the results may have been worse because, according to the
3 record, the company, in light of its business and client
4 relationships, might well lose business as the bankruptcy
5 continued and as clients of the company began to have greater
6 concern over the company's ability to perform and to perform in
7 a timely fashion.

8 So I will approve the sale, under Section 363. We
9 need to set a date for the committee to complete its
10 investigation of the open issues. I'm told, by Mr. Califano
11 that that will not hold up closing of the sale. The committee
12 is looking for thirty to -- forty-five days, if I recall.

13 MR. COHEN: Yeah, Your Honor. I think it'll take the
14 committee a week to two weeks to get an advisor on board and
15 actively working. So I think sixty days would be the
16 appropriate time frame --

17 THE COURT: Sixty days?

18 MR. COHEN: -- given the holidays and the time to
19 retain somebody.

20 MR. CALIFANO: Your Honor, I do want to set the record
21 straight. I mean, they make it appear that we gave them this
22 information late. We gave them the information on the schedule
23 that they agreed to and we gave it to them timely.

24 Also, all this information, and we had our advisors
25 put together a compilation of information that was already in

1 the data room. So they could have, with some digging, found
2 it.

3 That being said, I understand what they want to do and
4 I -- we have done an investigation and I know there are no
5 significant claims here. I want them to come to the same
6 conclusion, Your Honor. So I have to consult with Ms. Levine,
7 who represents Mr. Gallo. So what I would suggest, Your Honor,
8 is that rather than doing this in open court we try and work a
9 three-way scheduling order. And I'm sensitive to their needs,
10 I also do think it's not -- it's not accurate for them to say
11 they were jammed with this at the last minute. But I would
12 suggest that --

13 THE COURT: I didn't hear that.

14 MR. CALIFANO: But I would suggest we have a three-way
15 conversation, since Ms. Gallo (sic); I'm sorry, Ms. Levine
16 represents Mr. Gallo and Mr. Simms and we can submit an agreed
17 upon scheduling order. And if we can't reach something within
18 the next forty-eight hours, then maybe we could have a
19 conference call with the Court.

20 THE COURT: All right.

21 MR. SAGE: One question. The DIP budget has an agreed
22 amount for committee professionals and I just want to make sure
23 that this new financial advisor isn't become part of my
24 purchase price.

25 THE COURT: Well, I -- I wondered myself how the new

1 advisor was going to get paid but that's the committee's
2 business at this point and if they want to spend money in that
3 fashion or get an advisor who is willing to work pro bono, that
4 remains to be seen.

5 MR. COHEN: Your Honor, actually when we reached our
6 accord with the purchaser and the debtor at the bid procedures
7 hearing, the budget was split up into pre-sale and post-sale
8 phases, and there's more than adequate cushion in both phases
9 to accommodate the additional professional.

10 MR. SAGE: And to the extent they're coming within the
11 agreed upon buckets, that's agreed. We agree. But it -- I
12 just was -- I was expecting that between the firm fees and what
13 the advisor would we may exceed that, but they won't and we
14 have no problem with it.

15 THE COURT: All right. I think I'll take Mr.
16 Califano's suggestion that we do this either by subsequent
17 order or perhaps we need a paragraph in this order excluding
18 out certain matters.

19 MR. CALIFANO: Yes, Your Honor.

20 THE COURT: We could put the dates in there; we could
21 put the dates in a scheduling order.

22 MR. CALIFANO: Yes. I think we should have -- for the
23 sale order to move quickly we'll add that paragraph and then
24 have a separate scheduling order that will be agreed upon by
25 the parties.

1 THE COURT: All right. All right. Shall we take a
2 look at the sale order?

3 MR. CALIFANO: Sure, Your Honor.

4 THE COURT: Page 3, paragraph C. "This order is
5 intended to constitute a final order." I can't tell an
6 appellate court that it's a final order or it isn't. You've
7 probably heard me say that before.

8 MR. CALIFANO: Yes I have, Your Honor.

9 THE COURT: All right. At least I try to be
10 consistent.

11 MR. CALIFANO: You are.

12 THE COURT: And then in the last line of that order:
13 "especially directs the entry of the order as set forth
14 herein".

15 Page 5, paragraph L, third line, "The committee has
16 said that they have no avoidance or similar claims against the
17 second lien lenders" but I think that we should keep this
18 limited to the sale and so we should just strike everything
19 after, on the third line, "And otherwise has proceeded in good
20 faith in all respects". I don't imply that they haven't but --

21 Paragraph D, down below, there is no evidence in the
22 record that the buyer induced or caused the Chapter 11 filings.
23 Paragraph N, on page 6, the fifth line, strike any state
24 territory, possession or the District of Columbia or any
25 foreign country.

1 My hope is that by excluding these things maybe it
2 will get onto your computer and the next one will omit some of
3 this. Or Mr. -- or the Dechert computer. Dechert's been
4 through this before.

5 Page 7, Q, I think we can say the APA was not entered
6 into for the purpose of hindering, delaying or defrauding
7 creditors, period.

8 Then the definition of claims. Liability, and I'm in
9 the middle of paragraph R, in the middle of "Liabilities,
10 obligations, demands, guarantees," I think options -- and then
11 I think we should strike the words options, rights, contractual
12 commitments and restrictions from that list. I don't think I
13 can deal with contractual restrictions. This is, I think, --
14 this is, I think, a general point.

15 And similarly, at the bottom of that page, "Or in
16 respect of taxes". This is pre-closing taxes but restrictions,
17 rights of first refusal, restrictions on use, voting transfer,
18 I can't -- if it's in the contract and you're assuming the
19 contract, it's in the contract. If it runs with the land --
20 well, I don't think you're getting any land in this case, but
21 if it's in the lease and you're assuming the lease, you're
22 stuck with it. So that -- I would strike all of that after
23 taxes.

24 Page 9 -- I gather that the cure notice has been
25 served, is that right? Or it will be? Has been served?

1 MR. CALIFANO: Has been served, Your Honor.

2 THE COURT: Okay. And then at the top of page 10, the
3 proposed hearing date is not November 17th but November 16th.

4 MR. CALIFANO: That is correct, Your Honor.

5 THE COURT: At 2:30 p.m. Then I think we should have
6 a hearing on that anyway. You have a hearing, it's an omnibus
7 anyway so W, paragraph W should be revised.

8 Page 11, paragraph 2, strike the parenthetical
9 incorporating the record by reference. Page -- paragraph 3,
10 also on page 11, am I extinguishing avoidance and preference
11 actions? Is that what you want me to do? I just ask you to
12 look at that, maybe that's what I'm doing but it be subject to
13 the release by the putative defendant of its or his or her
14 claims against the debtor.

15 Page 13 --

16 MS. HERSHCOPF: Your Honor, it would seem like in that
17 paragraph 3, as well, we should cross reference the retention
18 of Gallo and Simms.

19 THE COURT: All right. That would be one place too.

20 MS. HERSHCOPF: A good place to put it.

21 MR. SAGE: Your Honor, I'm not clear on the
22 suggestion.

23 MR. CALIFANO: I think the suggestion is that we put
24 appropriate language, because we're not modifying the schedule
25 1.1(a)(9) that would put language in here relating to the

1 future hearing.

2 THE COURT: Okay.

3 MR. CALIFANO: And we'll work out language.

4 THE COURT: All right. Page 13, last line after the
5 word closing, just add after "request", "therefore".

6 (Pause)

7 THE COURT: We're on page 15, paragraph 13. The
8 language is awfully broad in the second paragraph. Can we add,
9 in the second sentence, fifth line down from the top of the
10 paragraph, to the greatest extent available under applicable
11 law.

12 MR. CALIFANO: Yes.

13 THE COURT: And then just take a look at the use of
14 the word warranties. Do you want to -- are you rejecting or
15 warranties --

16 MR. CALIFANO: We've actually already assumed them.

17 THE COURT: I thought you already assumed them?

18 MR. CALIFANO: We did, Your Honor.

19 THE COURT: Maybe you want to take out the word
20 warranties or look at it. Warranties to the extent not
21 assumed.

22 MR. SAGE: I'm willing, if you want, me to -- going to
23 the prior suggestion, I'm just a little bit concerned that that
24 gives third parties the right to argue it's not permissible.

25 THE COURT: Well, in fact, I think under applicable

1 law the extent to which I can cut off any successor liability
2 is -- is doubtful. We're certainly not warranting -- the
3 estate is not warranting that I'm able to do it in an order
4 like this.

5 It just seemed to me this sentence, the buyer shall
6 not be liable for any claims against the debtors or any of its
7 predecessor's affiliates for actions taken or liabilities
8 incurred prior to the closing. I think it needs some
9 qualification.

10 MR. SAGE: I would prefer to do that than to be set
11 out from the language.

12 THE COURT: All right. Then, I think, in the next
13 paragraph, on page 16, line 3; I think we should strike the
14 words the acquired assets. It's all right relating to the
15 debtors, the operation of the debtors' business but the
16 acquired assets are something different. You're acquiring
17 them. If they have -- if you're acquiring land, and I don't
18 believe you are, you're acquiring land with any environmental
19 problems that are on the land and we can't do anything about
20 that. But you're not acquiring any land so I'm not sure that
21 that's an issue. But I would strike the words "The acquired
22 assets".

23 MR. SAGE: I'm sorry. I was taking a note and I'm not
24 exactly sure where you are.

25 THE COURT: I'm on page 16, line 3.

1 MR. SAGE: Paragraph 14?

2 THE COURT: Yeah.

3 MR. SAGE: I was confused. Okay.

4 THE COURT: And then two lines down, I'm willing to
5 say are forever barred and estopped. I'm not enjoining anyone.
6 So just strike and permanently enjoined. And then two lines
7 down from there, we've defined liens and claims but now we've
8 got interests thrown in. So why don't we say liens or claims
9 and strike this new word, interests. Maybe this is -- just ask
10 the parties to look at the rest of this because I'm not sure
11 the sentence holds together.

12 Page 17, take a look at paragraph 16 as to whether or
13 not it requires modification based on what we've done today.
14 There's a reference to releases of potential claims and liens,
15 I don't think we're -- I'm not sure we're releasing anything.
16 So maybe if we just got rid of the "Constitute valid
17 consideration for the sale or the sale agreement and the
18 provisions thereof". The last sentence is a repetition but
19 I -- we'll leave it in because if we say it twice the corporate
20 lawyers feel better.

21 Page 18, paragraph 20, we've got an open issue between
22 the first lien and the second lien, or do we, there's an amount
23 in brackets.

24 MR. SAGE: That's been resolved, Your Honor. I
25 apologize. The final number is 10,000 dollars.

1 THE COURT: It is. All right. We'll take the
2 brackets out here. That's good. That simplifies things.

3 A hearing on the contracts -- we're on page 19, the
4 hearing is on the 16th at 2:30, okay. Then paragraph 23 should
5 be revised. I think we need the hearing but parties don't --
6 obviously no one needs to show up but the debtor.

7 Page 20, paragraph 24 is a -- you already have that in
8 there several times, why don't you just take out the paragraph.
9 Page 21, paragraph 30 -- and we're almost done, modifications
10 at the end of that paragraph I would add, comma, reasonable
11 advance notice is provided to the creditors' committee and
12 posted on the docket.

13 Paragraph 30 -- pardon me, 31, three lines up from the
14 bottom, let's say liens or claims and get rid of the "Or other
15 interest".

16 And finally, tell me what paragraph 32 is supposed to
17 mean. Shall we ask one of the corporate lawyers what it means?

18 MR. CALIFANO: I think we should take it to Mr. Sage.

19 MR. SAGE: Let's read it. Your Honor, we're just --
20 we're making payments --

21 THE COURT: Mr. Sage, go ahead.

22 MR. SAGE: Perhaps they crafted this offline and I
23 don't actually like the paragraph very much.

24 THE COURT: I think what you're trying to say is that
25 if we're paying administrative expenses, under the asset

1 purchase agreement, they're deemed to be appropriate and actual
2 administrative expenses --

3 MR. SAGE: Correct.

4 THE COURT: -- under the circumstances. But perhaps
5 this language can be improved.

6 MR. SAGE: Agreed.

7 THE COURT: All right. So you'll revise the order and
8 provide the committee and us with a revised order and I'll get
9 it entered.

10 MR. CALIFANO: Yes, Your Honor. Thank you.

11 THE COURT: All right. Now you have your motion to
12 pay amounts under the --

13 MR. CALIFANO: PPN.

14 THE COURT: -- PPN. No objection. Payments will be
15 by the purchaser?

16 MR. CALIFANO: Yes, Your Honor.

17 THE COURT: And I'll approve -- I'll approve the
18 motion without objection.

19 MR. CALIFANO: Thank you, Your Honor.

20 THE COURT: Anything else today?

21 MR. CALIFANO: No, Your Honor.

22 THE COURT: Anything from any other party? All right.
23 Thank you very much.

24 MR. CALIFANO: Thank you, Your Honor.

25 (Whereupon these proceedings were concluded at 4:03 p.m.)

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I N D E X

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preferred provider network approved		

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Lisa Bar-
Leib

Digitally signed by Lisa Bar-Leib
DN: cn=Lisa Bar-Leib, o, ou,
email=digital1@veritext.com,
c=US
Date: 2011.11.11 14:26:30 -05'00'

LISA BAR-LEIB (CET**D-486)

AAERT Electronic Certified Transcriber

Also transcribed by: Pnina Eilberg (CET**D-488)

Dena Page

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

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